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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. —

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

MAX HARRY BLOCK, AN INDIVIDUAL, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF BLOCK'S SHOE STORES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in this case on November 19, 1943.

OPINIONS BELOW

The findings of fact and conclusions of law entered by the district court are printed at R. 223–226. The district court delivered an oral opinion,

not printed in the record, which is reported at 5 Wage Hour Rept. 494. The opinion of the circuit court of appeals (R. 471) and the dissenting opinion of Judge Garrecht (R. 473) are not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered on November 19, 1943 (R. 481). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether employees employed in the central warehouse of a chain store system, through which goods move from outside the State to nineteen separate retail stores in three States, are "engaged in a retail or service establishment" and therefore exempt from the wage and hour provisions of the Fair Labor Standards Act.

STATUTE INVOLVED

The statute involved is the Fair Labor Standards Act, 52 Stat. 1060, 29 U. S. C., sec. 201 *et seq.* Section 13 (a), the interpretation of which is involved in this case, provides:

> SEC. 13. (a) The provisions of section 6 and 7 shall not apply with respect to * * * (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce * * *.

STATEMENT

This case arises upon a complaint (R. 2–7) filed by petitioner in the district court under Section 17 of the Fair Labor Standards Act, praying for an injunction directing respondent to cease violations of the overtime and record-keeping provisions of the Act (Sections 7 and 11). The facts, which are not disputed, may be summarized as follows:

Respondent owns and operates a chain of nineteen retail shoe stores, fourteen located in various cities in Washington, three in Oregon and two in Idaho (R. 40–41, 224). The stores sell annually over a million dollars worth of shoes, rubbers, gloves, shoe laces, and shoe polish (R. 50, 63, 80, 141). These goods are bought by respondent outside the States of Washington, Oregon, and Idaho, chiefly from manufacturers in eastern States, and are shipped in by railroad (R. 31, 83–86, 224, 274).

Entirely separate from the retail stores, defendant maintains in Seattle, Washington, a warehouse and central office (R. 40–41, 224). About 90 percent of the goods purchased in the eastern States and sold in the retail stores go first to this warehouse. They are brought to the warehouse from the railheads by a local transfer company. There they are weighed, checked, unpacked, sorted, repacked and shipped to the retail outlets. (R. 225, 324, 356, 105, 110, 161–162.) Only a

small part of the goods—about 10 percent—reach the warehouse shelves; 80 percent is reshipped to the retail stores immediately (R. 94, 95, 109–110, 275). Moreover, approximately 30 percent is shipped out of the State to defendant's stores in Oregon and Idaho (R. 266, 268, 275, 276).[1] Thus, the products handled by respondent move in a continuous interstate flow from the East to the Seattle warehouse and thence to retail outlets in Oregon and Idaho as well as Washington.

All the employees whose status under the Act is disputed here work in the Seattle warehouse and central office exclusively and not in the retail stores (R. 225). Some receive and check the incoming shipments (R. 107–108, 161–162, 278, 356–359); others are clerical and bookkeeping employees who post stock records and invoices, handle correspondence, take shipping instructions and keep other necessary accounts and records of the business (R. 159–167, 278, 361–362, 373–374); several are maintenance employees (R. 168–170).

Respondent does not pay for overtime work at one and one-half times the employees' regular rate of pay, in accordance with Section 7 of the Act, and he has failed to keep records required under Section 11 (R. 363, 366, 440–441, 448–449, 348, 280–285).

Upon the foregoing facts, the district court entered a decree dismissing the complaint

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[1] The findings by the district court give 15 percent to Oregon and Idaho and 85 percent to Washington as the percentages (R. 225) but this figure conflicts with respondent's statements in answer to interrogatories, cited above.

(R. 227–228). The district court found (1) that "neither the defendant nor any of his employees is engaged in interstate commerce" as defined by the Act; and, alternatively, (2) that the employees are exempt under Section 13 (a) (2) because they are "engaged in a retail or service establishment" (R. 225–226).

On appeal the circuit court of appeals affirmed the decree by a divided court (R. 471, 473). All three judges assumed that the employees were employed in interstate commerce, pointing out that some of them were certainly so engaged (R. 472, 474).[2] The majority placed its decision on the ground that the warehouse and central office employees, although they did not work in any of the retail stores, nevertheless were "engaged in a retail or service establishment" and so exempt under Section 13 (a) (2); it held (R. 473)—

> Whether appellee's stores constitute a single establishment or whether each, in appropriate circumstances, is to be regarded as a separate establishment, is a question we need not consider. All we decide is that the services involved were a mere incident to and an integral part of the operation of each store in the group.

[2] Inasmuch as goods handled in the warehouse were shipped to other states, the employees also were engaged in producing for interstate commerce within the meaning of the definition contained in Section 3 (j) of the Act. In *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 565, it was conceded that employees in warehouses shipping across state lines come within the commerce coverage of the Act.

Judge Garrecht dissented, holding that the words "retail establishment" apply only to a store or similar place of business at which goods are sold at retail (R. 474 *et seq.*).

REASONS FOR GRANTING THE WRIT

1. The decision of the circuit court of appeals interpreting Section 13 (a) (2) raises a question of importance in the administration of the Fair Labor Standards Act of 1938.

Since 1938 the Administrator of the Wage and Hour Division has consistently taken the position in formal interpretative bulletins and in enforcement proceedings that the term "retail or service establishment" refers to a store or similar place of business at which goods are sold at retail (see Interpretative Bulletin No. 6, issued December 1938 (revised June 1941), paragraphs 33–37). In the 1941 revision of Interpretative Bulletin No. 6, he said (par. 37):

> The question has been raised as to the scope of the term "establishment" in the case of chain-store systems * * *. The exemption, however, does not apply to warehouses, central executive offices * * * or other non-retail selling units which distribute to or serve stores. These are physically separated establishments which do not have the characteristics of retail or service establishments.[3]

[3] The same explicit statement was made by the Administrator in his Annual Report to Congress for 1939, p. 21.

This bulletin, and the administrative practice under it, are based on the deliberate judgment of officials who were familiar with the legislative background and who in enforcing the Act were bound to interpret it expertly in the light of the practical competitive and other economic problems.

This administrative interpretation was entitled to receive great weight in the court below. See *United States* v. *American Trucking Assns.*, 310 U. S. 534. It was supported by the legislative history of Section 13 (a) (2) and by prior administrative, legislative and judicial treatment of chain store organizations (see pp. 11–13, *infra*). It had been sustained by the Circuit Court of Appeals for the Third Circuit (see *Walling* v. *American Stores Co.*, 133 F. (2d) 840). Nevertheless, the court below rejected the Administrator's view and held that employees in respondent's chain store warehouse were exempt from the wage and hour provisions of the Act.[4]

The question thus opened affects thousands of companies and their employees. The Census of Business, 1939, lists 6,969 chain store organizations. More than one-third of them reported that they operated separate warehouses or separate central offices. More than 50,000 employees

[4] No question is involved concerning the Section 13 (a) (1) exemption of employees engaged in a local retailing capacity.

were employed in central offices alone, 20,000 in warehouses alone, and about 40,000 in combined central offices and warehouses. The total pay roll amounted to more than $200,000,000, $79,000,000 of which was paid to employees in combined central offices and warehouses similar to the central offices and warehouse involved in the instant case. There is no way of knowing, of course, how many of these chains already comply with the Act voluntarily, but actually or potentially the question presented affects them all because their methods of doing business are basically the same.

Less significant but nevertheless indicative of the importance of the question is the volume of litigation dependent upon its answer. The Administrator now has pending more than a dozen suits which turn chiefly upon the issue presented here.[5] Additional files being reviewed in his

[5] *Walling* v. *Paramount Richards Theaters, Inc.*, Civ. No. 659, E. D. La.; *Walling* v. *Fox-Pelletier International Detective Agency, Inc.*, Civ. No. 572, W. D. Tenn.; *Walling* v. *New Orleans Private Patrol Service*, Civ. No. 373, E. D. La.; *Walling* v. *Goldblatt Bros.*, 128 F. (2d) 778 (C. C. A. 7) now awaiting trial on remand in N. D. Ill.; *Walling* v. *Fred Wolferman, Inc.*, Civ. No. 1694, W. D. Mo.; *Walling* v. *Automatic Canteen Co. of Pittsburgh*, Civ. No. 2777, W. D. Pa.; *Walling* v. *A. H. Phillips, Inc.*, 50 F. Supp. 749 (D. Mass.), pending on appeal to C. C. A. 1; *Walling* v. *Mutual Wholesale Food & Supply Co.*, 46 F. Supp. 939 (D. Minn.), pending on appeal to C. C. A. 8; *Walling* v. *Phillips Petroleum Co.*, Civ. No. 185, N. D. Tex. (Amarillo Div.); *Walling* v. *Ward Drug Co.*, Civ. No. 931, N. D. Tex.; Cf. *Walling* v. *Phillips & Buttorff Mfg. Co.*, Civ. No. 322, N. D. Tenn.; *Lane Drug*

offices with a view to enforcement action are being held up pending clarification of the question. The question is squarely raised in the instant case. Its decision would benefit employees, employers and the Government equally by ending much of this litigation.

2. The decision below is in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *Walling* v. *American Stores Co.*, 133 F. (2d) 840. The defendant in that case operated a large chain of retail stores covering several States; in addition it had eleven warehouses, bakeries and canneries. As in the present case, it was argued that the entire chain constituted a single retail establishment. The Third Circuit, however, rejected that contention and expressly approved the Administrator's interpretative bulletin by construing the words "retail or service establishment" to include only stores or similar places of business where goods are sold to customers, and to exclude separate non-selling units (see p. 6, *supra*). The rationale of the decision and its approval of the administrative interpretation cannot be reconciled with the decision of the Circuit Court of Appeals for the Ninth Circuit in the instant case.

Co. v. *Glascott*, Civ. No. 4814, N. D. Ohio. Among the employee suits involving the question are *Johnson* v. *Castner-Knott Dry Goods Co.*, Civ. No. 301, N. D. Tenn.; *Holloway* v. *H. G. Hill Co.*, Civ. No. 59034, Chancery Court of Davidson Co., Tenn.

In the court below, Judge Healy suggested that the *American Stores* case was distinguishable from the instant case because the American Stores Company produced or processed goods at its warehouses on an extensive scale (R. 473). But this is an accurate description of only some of the warehouses involved in the *American Stores* case; others did no manufacturing or processing and performed precisely the same functions in the American Stores chain as the warehouse involved in this case performed in the Block chain. Consequently, the decisions, as well as the reasoning of the two circuit courts, cannot be reconciled.[6]

[6] *Walling* v. ~~*Goldblatt Bros.*~~ *L. Weinberg Co.*, ~~128~~ 138 F. (2d) ~~778, 783~~ 602 (C. C. A. 7), ~~is~~ is in accord with the decision below. We are filing a petition for a writ of certiorari in that case raising not only the question raised here but also the equally important question whether the employees in a chain store warehouse serving stores *in a single State* are engaged in commerce within the meaning of the Act. On the other hand, in *Walling* v. *Goldblatt Bros.*, 128 F. (2d) 778, 783 (C. C. A. 7), the same court said:

> Further we think that such elimination of applicability was intended to include only ordinary retail stores, Fair Labor Standards Act of 1938 § 13 (a) (2), 29 U. S. C. A. § 213 (a) (2), and not a great establishment shipping goods out of the state to two of its important outlets. *Fleming* v. *American Stores Co.*, D. C., 42 F. Supp. 511. * * *

The opinion in *Allesandro* v. *C. F. Smith Co.*, 136 F. (2d) 75 (C. C. A. 6) is not clear but apparently it rests upon a ruling as to coverage and not as to the scope of the exemption.

The decisions in the district courts are also in conflict. The decision in *Walling* v. *A. H. Phillips, Inc.*, 50 F. Supp.

3. The decision below is erroneous. The legislative history of Section 13 (a) (2) makes it abundantly clear that the purpose of Congress was to exempt small retail stores which might otherwise be covered as a result of their location near State lines,[7] and not to exclude from the benefits of the Act employees engaged in chain store warehouses that in fact perform the functions of a wholesaler. The words of Section 13 (a) (2) likewise reveal this purpose. In ordinary usage an "establishment" is a place of business; a retail establishment is a place where goods are held and sold to small consumers. In business usage also this is the accepted meaning. Under sundry N. R. A. Codes of Fair Competition drafted by industry committees, chain store warehouses and other non-retail selling units were regarded as separate and distinct from the retail outlets.[8] The Bureau of the Census regards each physically segregated unit of a chain store organi-

749 (D. Mass.), follows the decision in the *American Stores* case but two other district courts have reached the same result as the court below. *White* v. *Jacobs Pharmacy Co.*, 47 F. Supp. 298 (N. D. Ga.); *Veazey Drug Co.* v. *Fleming*, 42 F. Supp. 689 (W. D. Okla.).

[7] See *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 571.

[8] See N. R. A. Codes of Fair Competition, vol. IV (Dec. 1933), pp. 457–472; N. R. A. Codes of Fair Competition, vol. V (Jan. 1934), pp. 1–15. The Food and Grocery Chain Stores of America—since 1937 the National Association of Food Chains—was one of the national associa-

zation as a distinct establishment.[9] The legal usage is the same. It is beyond question that "establishment" as used in the child labor section of the Act (Section 12) refers to each separate warehouse or store and not to the entire business of the chain. And both legislatures and courts have rather uniformly treated each unit of a chain as a distinct establishment even in such

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tions which participated in the formulation of the Wholesale Food and Grocery Code. *Id.* at 4.

The Retail Food and Grocery Trade Code defined "Food and Grocery Retailer" as "any individual or organization engaged wholly or partially in the retail food and grocery trade." "Retail Food and Grocery Establishment" or "establishment" was defined as "any store, department of a store, shop, stand, or other place where a food and grocery retailer carries on business." Cf. Interpretative Bulletin No. 6, par. 37.

The Code of Fair Competition for the Retail Tobacco Trade, approved June 19, 1934, provided that "chain of stores" included "central distributing depots from which individual units are serviced" (Art. II, section 13) while "retail tobacco establishment" or "establishment" was confined to places of business where tobacco products were sold. See N. R. A. Codes of Fair Competition, vol. XII, pp. 41–56, Art. II, secs. 13 and 14. In the Code for the Retail Trade, approved October 21, 1933, "establishment" was defined in terms of a place of business (such as "store, shop, stand"), engaged in selling. See N. R. A. Codes of Fair Competition, vol. II, pp. 30–42. The National Council of Shoe Retailers was one of the national associations which participated in the formation of the Retail Trade Code. *Id.* at 28.

[9] The Bureau of the Census of the United States Department of Commerce, adopting the "establishment" as the basic unit in compiling census reports on manufacturing, wholesaling, and retailing, has defined "establishment" as

varied fields as taxation,[10] fire prevention, child labor, and hours of employment.[11]

In view of the purpose of Section 13 (a) (2) there can be little doubt that "establishment"

"the place where the business is conducted" (see Instructions to Enumerators for Business and Manufacturers (1939), Sixteenth Decennial Census of the United States, p. 22; also, U. S. Bureau of the Census, Census of Business, Retail Trade: 1939, Types of Operation, p. 3) and draws a sharp distinction between "establishment" and "organization" or "company." See, e. g., Census Forms (1939), Form 10, used by multi-unit organizations to report data concerning central administrative offices, chain-store warehouses, etc.; Form 21 (retail schedule); Form 31 (wholesale schedule). The Census regards each store, office, warehouse, manufacturing or processing plant, or other physically segregated unit of a chain-store organization as a separate "establishment." Only places of business (stores) engaged in retail selling are considered "retail establishments." See Instructions to Enumerators for Business and Manufacturers (1939), Sixteenth Decennial Census of the United States, p. 17; and U. S. Bureau of the Census, Census of Business, Retail Trade: 1939, Types of Operation, p. 3. Other units of multi-unit organizations are classified as manufacturing establishments, wholesale establishments, or in a special category depending upon the functions performed. See Instructions to Enumerators, etc., *supra*, pp. 22, 90–116. They are nowhere classified as retail establishments. In fact, chain-store warehouses and central-buying offices "maintained apart from the stores" are specifically excluded. U. S. Bureau of the Census, Census of Business, Retail Trade: 1939, Types of Operation, p. 4.

[10] See Ala. Code (1940), ti. 51, secs. 620–629; Colo. Stat. Ann. (1935), vol. 4, c. 161, secs. 1–11; Del. Rev. Code (1935), c. 6, sec. 145, p. 59; Fla. Stat. Ann. (1941), secs. 204.01–204.16; Ga. Laws (1937), no. 355, secs. 1–13, p. 75; Idaho Sess. Laws (1933), c. 113, secs. 1–15; Ind. Stat. Ann. (Burns,

was used there with this settled meaning. But were the matter doubtful, the consistent administrative interpretation would be determinative. See *United States* v. *American Trucking Associations, supra.*

1933), secs. 42–301—423–313; Iowa Code (1939), c. 329.5, secs. 6943.126–6943.141; Ky. Acts (1940), c. 174, secs. 1–12; La. Gen. Stat. Ann. (1932), vol. 6, secs. 8664–8674; Md. Code Ann. (1939), vol. 2, art. 56, sec. 65; Mich. Comp. Laws (Mason Cum. Supp. 1940), vol. 5, c. 186a, secs. 9757–1—9757–13; Minn. Stat. (1941), vol. 1, secs. 328.01–328.16; Miss. Gen. Laws (1936), c. 157, secs. 1–9; 1939 Supp. to Mont. Rev. Code 1935, c. 221, secs. 2428–2428.14; N. C. Pub. Laws (1939), c. 158, sec. 162; S. C. Code (1942), vol. 2, sec. 2556; S. D. Code (1939), vol. 3, c. 57.34, secs. 57.3401–57.3407; Tex. Stat. (Vernon 1936), Penal Code, art. 1111d, secs. 2–11; W. Va. Acts (reg. sess. 1933), c. 36, secs. 1–12; Wis. Spec. Sess. Laws (1937), c. 12, expired July 1, 1939. Compare *Great Atlantic & Pacific Tea Co.* v. *Morrissett*, 58 F. (2d) 991 (E. D. Va.), affirmed 284 U. S. 584.

[11] See 16 A. L. R. 539 and 96 A. L. R. 1351 for a compilation of cases decided under these statutes, including numerous cases turning on the meaning of "establishment." In applying these statutes several courts have indicated clearly that the "establishment" contemplated is a physical place of business—the mill, workshop, or factory—and have, accordingly, held physically segregated units of a multi-unit, integrated enterprise a separate "establishment." See *Bubb* v. *Missouri, K. & T. R. R. Co.*, 89 Kans. 303, 305, 131 Pac. 575 (1913) (carpenter shop of railroad company housed in separate building); *Truman* v. *Kansas City, M. & O. R. R. Co.*, 98 Kans. 761, 764–765, 161 Pac. 587, 588–589 (1916) (car repair shop of railroad company). See also *Baltimore & O. S. W. R. R. Co.* v. *Cavanaugh*, 35 Ind. App. 32, 71 N. E. 239 (1904); *People* v. *Transit Development Co.*, 178 App. Div. 288, 165 N. Y. Supp. 114 (2d dept. 1917); *McNabb* v. *Clear Springs Water Co.*, 239 Pa. 502, 87 Atl. 55 (1913).

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

DOUGLAS B. MAGGS,
Solicitor of Labor.

FEBRUARY 1944.

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In the Supreme Court of the United States

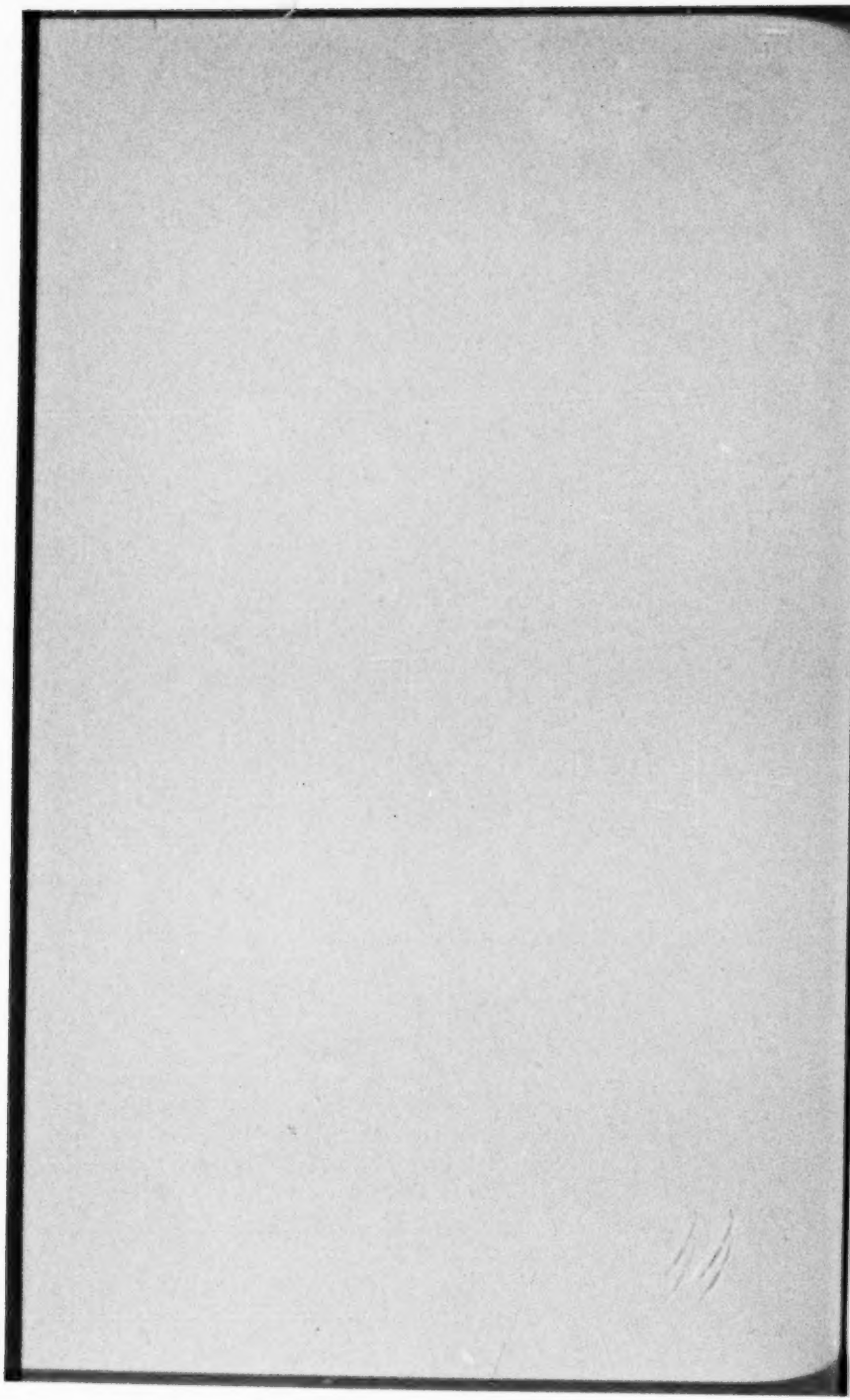
OCTOBER TERM, 1943

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

vs.

MAX HARRY BLOCK, AN INDIVIDUAL, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF BLOCK'S SHOE STORES

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI



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No. 685

In the Supreme Court of the United States

OCTOBER TERM, 1943

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

vs.

MAX HARRY BLOCK, AN INDIVIDUAL, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF BLOCK'S SHOE STORES

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Respondent, Max Harry Block, an individual, doing business under the firm name and style of Block's Shoe Stores, respectfully submits this brief in opposition to the petition for writ of certiorari.

OPINION BELOW

The opinion of the circuit court of appeals (R. 471) is reported in 139 F.(2d) 268.

STATEMENT

Respondent's business consists solely of selling merchandise at retail in nineteen stores, fourteen of which are in Washington, three in Oregon, and two in Idaho. Three of the stores are located in

Seattle where also is located the warehouse and central office (Ex. 1; R. 290).[1] Respondent operates his business as a single establishment (R. 424). Some merchandise is purchased locally, but the major portion is purchased from eastern suppliers; some merchandise is shipped directly to the stores, but the major portion is received in the warehouse and redistributed to the stores (R. 472).[2] The petition (p. 3) states that the warehouse and central office are maintained "entirely separate from the retail stores." The circuit court of appeals on the contrary found in conformity with the holding of the district court that the services involved in the warehouse and central

[1] The so-called warehouse is a room of approximately 3400 square feet, adjoining which is the central office (R. 353, 352, 411). These are located on the third floor of an office building in the central retail district of Seattle (R. 41, 172, 173, Ex. 4; R. 306). This building is immediately adjacent to the building in which is located one of the Seattle stores (R. 40, 145, 172). An average of approximately ten employees are employed in the warehouse and central office, two of whom are receiving and shipping clerks employed in the warehouse (R. 161) and the remainder are executive, administrative, clerical, bookkeeping, and maintenance employees employed in the central office (R. 239, 278).

[2] Although it is claimed by petitioner that the employees in the warehouse are engaged in interstate commerce, it is not claimed that respondent or any of his employees are engaged in the *actual* production or manufacture of goods for commerce within the meaning of Section 3(j) of the Fair Labor Standards Act of 1938, herein called the "Act." It is likewise not claimed that the greater part of the retail selling of respondent is other than in intrastate commerce.

office "were a mere incident to and an integral part of the operation of each store in the group" (R. 473).

QUESTION PRESENTED

The petition (p. 2) states the question presented as being whether the employees employed in the "central warehouse"[3] are engaged in a "retail or service establishment" and therefore exempt from the wage and hour provisions of the Act.

The district court held that the employees employed in both the warehouse and central office were (1) within the exemption of Section 13(a)(2) of the Act, herein referred to as the retail exemption, and (2) were not engaged in interstate commerce and therefore not within the coverage of the Act (R. 225, 226). The district court held that the work performed by these employees was "incidental to and in furtherance" of respondent's retail business (R. 226).

The circuit court of appeals affirmed the decree of the district court dismissing petitioner's complaint on respondent's motion made at the close of the petitioner's evidence (R. 227, 465). The circuit court of appeals held that these employees were within the retail exemption and neither ap-

[3] This would appear to eliminate the employees in the central office from the question presented.

proved nor disapproved the holding of the district court that these employees were not within the coverage of the Act, except as to those engaged in distributing merchandise to the Oregon and Idaho stores.[4] Should the petition be granted and the decision below be reversed on the question presented, the case should be returned to the circuit court of appeals for the purpose of disposing of the question of coverage.

The question as presented in the petition is much broader than the decision below. It was not held that all employees in all such warehouses or central offices of a chain store system are within the retail exemption. The decision below was properly limited to the facts of this particular case and to the joint finding of both courts below that the services performed in the warehouse and likewise in the central office were "incidental to and in furtherance" of respondent's

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[4] The circuit court of appeals after referring to the finding of the district court that the employees were not engaged in commerce, stated: "However, for purposes of decision we assume the contrary, *Walling v. Jacksonville Paper Co.*, 317 U. S. 564; *Kirschbaum Co. v. Walling*, 316 U. S. 517, 519. Certainly those persons employed in and about the distribution of merchandise to the Oregon and Idaho stores were so engaged" (R. 472).

retail business and "a mere incident to and integral part of the operation of each store."

REASONS FOR GRANTING THE WRIT

First: The petition (p. 6) asserts that the decision of the circuit court of appeals interpreting the retail exemption raises a question of importance in the administration of the Act.

Any such question is self-imposed and has not resulted from any judicial uncertainty. Reduced to its simplest form the result of petitioner's position must be that the mere physical separation of the warehouse and central office from any one of the stores is sufficient to exclude application of the retail exemption to those employed in such warehouse and central office (See p. 16 infra). In the decision below it is stated: "The mere physical separation of appellee's warehouse from the stores themselves can hardly be regarded as a controlling factor" (R. 473).

It is important to note the difference between Interpretative Bulletin No. 6 (Revised June, 1941) and the original issue thereof in December, 1938. In the revision it is stated that the retail exemption does not apply to warehouses and central executive offices which distribute to or serve stores as these are "physically separated establishments which do not have the characteristics of

retail or service establishments."[5] The revision was issued not earlier than twenty days after the commencement of this action (R. 26) and was likewise issued after the commencement of the action in *Walling v. L. Wiemann Co.*, 138 F.(2d) 602 (C.C.A., 7)[6] and this is likewise apparently

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[5] In paragraph 18 of Interpretative Bulletin No. 6 (December, 1938) it is stated:

> "The question has been raised as to the scope of the term 'establishment' in the case of chain-store systems, branch stores, groups of independent retailers organized to carry on business in a manner similar to chain-store systems, and retail or service outlets of large manufacturing or distributing concerns. In the ordinary case, each physically separated unit or branch store will be considered a separate establishment within the meaning of the exemption."

In paragraph 37 of Interpretative Bulletin No. 6 (Revised June, 1941) there has been added the following:

> "The exemption, however, does not apply to warehouses, central executive offices, manufacturing or processing plants, or other non-retail selling units which distribute to or serve stores. These are physically separated establishments which do not have the characteristics of retail or service establishments."

[6] In reference to this the court in that case stated (p. 606):

> "It is unnecessary for us to assert or deny the Administrator's legal right to promulgate at any time an interpretation of any statute affecting his administrative duties. For the purpose of this argument we assume the existence of such right, if it is reasonably and fairly exercised. However, it is unfortunate that it was thought expedient and necessary to issue the revised bulletin within such a short time after this action was filed. That fact should be considered with all other pertinent evidence in determining the intention of Congress in enacting the statute in 1938, in view of the

true of the actions instituted in *Jehs v. Singer Sewing Machine Co.*, 5 Labor Cases 62,255 (D.C. Okla.), *Veazey Drug Co. v. Fleming*, 42 F. Supp. 689 (D.C. Okla.), and *Duncan v. Montgomery Ward & Co.*, 42 F. Supp. 879 (D.C. Tex.). In these cases as well as in *White v. Jacobs Pharmacy Co.*, 47 F. Supp. 298 (D.C. Ga.) and *Allesandro v. C. F. Smith Co.*, 136 F.(2d) 75 (C.C.A., 6) the position of the petitioner was not sustained.[7]

Inasmuch as the administrative interpretation of the retail exemption in Interpretative Bulletin No. 6 (Revised June, 1941) was actually challenged even before it was made, the decision in *Davies Warehouse Co. v. Bowles*, 88 L. Ed. Adv. Op. 379, 386 is all the more applicable. This court there refused to uphold an administrative ruling "no sooner made than challenged."[8]

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fact that the Administrator, in December of that year, issued the original Interpretative Bulletin No. 6 which was in force at the time this complaint was filed."

[7] The only reported case to the contrary is *Walling v. A. H. Phillips*, 50 F. Supp. 749 (D. C. Mass.). No similar finding was made in that case as here. If such finding could have been made then the court erroneously followed the decision in *Walling v. American Stores Co.*, 133 F.(2d) 840 (C.C.A., 3), which latter decision does not support the position of the petitioner.

[8] The administrative interpretations of the retail exemption in Interpretative Bulletin No. 6 (Revised June, 1941) are not consistent and are likewise ambiguous and therefore of little value. *Burnet v. Chicago Portrait Co.*, 285 U. S. 1, 16; *Sanford's Estate v. Commissioner of Int. Rev.*, 308 U. S. 39, 52 (See p. 16, *infra*).

It is submitted that there is not here presented an unsettled question of importance such as to warrant the granting of the petition.

Second: The petition (p. 9) asserts that a conflict exists between the decision below and the decision in *Walling v. American Stores Co.*, 133 F.(2d) 840 (C.C.A., 3).

Such conflict does not in fact exist. In the *American Stores* case (p. 841) it is stated that with the exception of certain enumerated exclusions the question for decision is whether "the sum total of the activity of the American Stores Company constitutes a 'retail establishment' so as to exempt the entire enterprise from the mandate of the statute."[9] It thus appears that except for the enumerated exclusions the court in that case was not considering the retail exemption as applied to any particular warehouse, but was dealing with the sole contention that the *entire enterprise* was within the retail exemption. Therefore, assuming that some of the warehouses involved in

[9] In the district court, *Fleming v. American Stores Co.*, 42 F. Supp. 511, 513 (D. C. Pa.), it is stated that the defendant's contention was "That the entire business of the American Stores Company of Delaware, and its subsidiaries, including the 2300 stores, warehouses, bakeries, manufacturing and processing operations, main offices, printing and multigraphing plant, transportation facilities, and repair and machine shops, constitutes *a single 'retail establishment'* whose primary business is selling at retail in intrastate commerce, and as such is exempt under Section 13(a)(2)."

that case did no "manufacturing or processing" as stated in the petition (p. 10), no conflict results.

The statement in the petition (p. 10) that some of the warehouses involved in the *American Stores* case performed precisely the same functions as the "warehouse" involved in this case is without support in the record. This is, of course, a question of fact and each case depends on the special facts pertaining to the particular business. *Walling v. Jacksonville Paper Co.*, 317 U. S. 564. The decision below found that the services involved in the warehouse and central office in this case "were a mere incident to and an integral part of the operation of each store in the group." No such finding was or could have been properly made in the *American Stores* case.

At the trial of this action the attorney for the petitioner stated: "Our evidence will show, or at least will be directed to show, that the office and warehouse is not, itself, a retail establishment, and does not perform the functions of a retail establishment; that it performs a separate function of wholesale distribution or intermediary distribution which is not the function of the retail establishment" (R. 257). No evidence, however, was offered as stated, but on the contrary the evidence is conclusive in support of the joint findings of both courts below that all of the functions performed in the warehouse and central office were

solely incidental to respondent's retail business (R. 416) and that such selling at retail could not be carried on without these functions being performed (R. 422).

The *American Stores* case has been considered by other courts having before them substantially the same factual situation as here and the decision in that case has been held inapplicable.[10]

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[10] In *White v. Jacobs Pharmacy Co.*, 47 F. Supp. 298 (D. C. Ga.), referring to the decision in the district court, it is stated (p. 301):

> "The American Stores Company case dealt with a parent organization and its subsidiaries having business ramifications in several states and as to which it was sought to relate each activity whether of manufacture or wholesale sales to the ultimate of retail sales. In the present case the whole business of the defendant is retail sales and such participation in commerce as is shown is purely incidental to its retail sales. If the defendant was engaged in any other business or made any substantial wholesale sales to other parties the exemption claimed would be unavailable, for it would not then be a retail establishment."

In *Walling v. L. Wiemann Co.*, 138 F.(2d) 602 (C.C.A., 7) the court did not follow its dictum in *Walling v. Goldblatt Bros.*, 128 F.(2d) 778, 783 and stated (pp. 605, 607) with reference to the American Stores Company:

> "* * * it was more than a retail establishment, for it was manufacturer, processor, transporter and distributor, and for that reason the court held that the warehouses were not a mere adjunct of the company's retail establishment. We think the facts in that case are in no way analogous to the facts here presented.
>
> "* * *.
>
> "We are unable to perceive the source of appellant's

Third: The petition (p. 11) asserts that the decision below is erroneous.

The argument that the legislative history of the retail exemption excludes its application as made by the circuit court of appeals is believed to be without merit. On the contrary, the legislative history is believed to demonstrate conclusively

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authority for ruling that the word 'establishment,' as used in the Act, refers to a physical place of business and does not refer to a 'business or enterprise as applied to multi-unit companies,' dealing wholly in intrastate business, and does not apply to appellee's warehouse and central executive offices, although the District Court found that such warehouse and offices constitute component and necessary parts of appellee's unitary business. The District Court found nothing in the Act, nor do we, to indicate such intention on the part of Congress, nor any language therein which would permit of such construction. * * * where the meaning is definite and clear, and the language is not fairly subject to more than one interpretation, it cannot be altered in any manner except by Congressional action, certainly not by administrative or judicial legislation."

In *Allesandro v. C. F. Smith Co.*, 136 F.(2d) 75 (C.C.A., 6), the court stated (pp. 77, 78) with reference to the American Stores Company:

"It was, the court said [133 F.(2d) 844] 'a multi-state business structure engaged in manufacturing and processing food products, warehousing and distribution of food items' and so not comparable to retail establishments sought to be exempted by Congressional grace.

"* * *. The sole business of the Smith Company is retailing and its warehousing of merchandise without other purpose than to provide for necessary and economical distribution of merchandise to its stores for sale at retail."

that Congress intended that the retail exemption should apply to the business of selling at retail in intrastate commerce and that there is not the remotest indication that it was of moment whether all of the activities incident thereto were conducted in a single location or building or whether the same were spread among several locations or buildings.

Justice Jackson, then an Assistant Attorney General, analyzed the original bills in the first proceedings at the Joint Hearings[11] and stated (p. 35): "It was not intended by this bill to apply generally to retailers or to apply to the service trades * * * and small business generally * * *. * * * generally speaking the policy of the bill is not to include the service trades and small business and the retailing enterprises. * * *. As a practical proposition the bill does not affect the retail trade."[12] Justice Black, then a member of

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[11] Joint Hearings, Senate Committee on Education and Labor, House Committee on Labor, 75th Cong., 1st Sess., Part I, on S. 2475 and H.R. 7200.

[12] What he meant by the reference to "small business generally" is made clear by his further statement: "In fact, there is in it a provision * * * for the exemption of businesses which have a number of employees below some certain figure which the Congress of course may fix."

the Senate, submitted the Senate Committee Report.[13]

The bill as passed by the Senate was referred to the House. In a debate on a petition to discharge the Committee on Rules, a member of that Committee stated: "Employees in retail establishments, including the big department and chain stores, as well as the small independent ones, are expressly exempted from the provisions of the bill," 82 Cong. Rec., 1399. On the bill coming before the House, Mrs. Norton, Chairwoman of the Committee on Labor, stated that the bill "absolutely exempts retailing," 82 Cong. Rec., 7281. During debate and due to the interstate movement of merchandise from suppliers, the question of the sufficiency of the exemption pertaining to retailing was discussed and despite Mrs. Norton's statement that "It has been stated time and time again that local retailing is exempted from the

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[13] Senate Committee Report, Report No. 884, 75th Cong., 1st Sess. The bill as there reported contained the present exemption found in Section 13(a)(1) of "persons employed in a * * * local retailing capacity" but did not contain the present retail exemption, Section 13(a)(2). The report nevertheless contains the following (p. 5): "* * * it is not even intended to include in its scope those purely local and small business establishments that happen to lie near State lines, and solely on account of such location, actually serve a wholly local community trade within two States," thus indicating that this was being accomplished by Section 13(a)(1). See in this connection the statement in *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 571.

bill," 82 Cong. Rec., 7436, 7437, a clarifying amendment exempting "any retail industry, the greater part of whose sales is in intrastate commerce" was submitted and passed. 82 Cong. Rec., 7437, 7438.[14] The resulting Conference Report[15] contained the present retail exemption, Section 13(a)(2), and as so reported the statute was enacted.[16]

The petition (p. 11) further states that it was not the purpose of Congress to exempt employees engaged in chain store warehouses that in fact performed the function of a wholesaler. Assuming the correctness of this statement it has no

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[14] Mr. Celler in reference to his amendment stated: "You have voted down amendments which would have made clear beyond peradventure of a doubt that retailing is exempted. The courts will look to the debates in this House for what is meant by these words. * * *. If you want to eliminate retailing, you should say so in clear-cut language, and this amendment which I offer indicates in the clearest way that retailing is exempted. * * *. * * * it is not the intention to include retailing—why not say so? My amendment actually says that." 82 Cong. Rec., 7438. Another member stated that the amendment would "expressly exempt retailing." 82 Cong. Rec., 7438.

[15] House Report No. 2738, 75th Cong., 3rd Sess., Senate Report 83 Cong. Rec., 9158, 75th Cong., 3rd Sess.

[16] In reporting to the House the result of the Conference Report, Mrs. Norton stated: "Every amendment which was adopted on the floor to the House bill we have retained." 83 Cong. Rec., 9257. It is believed clear that no one considered that the change in the phraseology of Mr. Celler's amendment adopted on the floor of the House in any way affected the exclusion of the "retail industry."

application here (p. 9, *supra*). There is an entire absence of testimony to support the assertion that the warehouse here performed the function of a wholesaler. In the absence of such testimony, the argument, if pertinent, is wholly without foundation. *Higgins v. Carr Brothers Co.*, 317 U. S. 572.

It is submitted that petitioner's extensive reference to sundry N.R.A. Codes of Fair Competition, the practices of the Bureau of the Census, the effect of the word "establishment" in Section 12 of the Act and the treatment of chain stores in various fields such as taxation, fire prevention, child labor and hours of employment (none of the factual material referred to was introduced in evidence) are of no assistance in determining the application of the retail exemption and are not in any manner persuasive of the meaning intended by Congress. The wide variety of purposes to be accomplished by such legislation, classification and regulation makes the same wholly inappropriate as a guide for either determining the intention of Congress or the meaning of the language used.[17]

The petition (p. 14) further states that were the matter doubtful, the consistent administrative interpretation would be determinative. The deci-

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[17] *Kirschbaum v. Walling*, 316 U. S. 517, 521; *Walling v. Jacksonville Paper Co.*, 317 U. S. 564.

sion in *United States v. American Trucking Associations,* 310 U. S. 534, 539, cited as authority for this statement, holds no more than that certain administrative interpretations are entitled to "great weight."

It is believed that the administrative interpretations in reference to related problems are both ambiguous and contradictory.[18] In determining the application of the retail exemption to a large department store, the Administrator now states that if all departments are operated as a single store, the enterprise taken as a whole, will ordinarily be considered to be the establishment.[19]

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[18] See p. 7, *supra.*

[19] In paragraph 20 of Interpretative Bulletin No. 6 (December, 1938) it was stated in reference to such stores: "* * * since all departments are operated under one roof, the enterprise, taken as a whole, will ordinarily be considered to be the establishment." The requirement of being *under one roof* has apparently been eliminated from paragraph 36 of Interpretative Bulletin No. 6 (Revised June, 1941) dealing with this subject. If this requirement is eliminated the interpretation is not consistent with that sought to be here applied, and if not eliminated physical location alone is the basis for the position here taken. Nothing is found within the terms of the statute which justifies a determination of the question of whether an enterprise is or is not a retail establishment predicated solely upon the physical location of its component parts. It is the nature of the business rather than the location or locations in which it is conducted which determines coverage or exemption under the statute. *White v. Jacobs Pharmacy Co.,* 47 F. Supp. 298, 301 (D. C. Ga.); *Walling v. L. Wiemann Co.,* 138 F.(2d) 602, 605 (C.C.A., 7).

If this be true, why should not the same apply to respondent's business?

The rationale of paragraph 40 of Interpretative Bulletin No. 6 (Revised June, 1941) is contrary to the position here taken by the petitioner.[20] The decision below conforms to the underlying theory of the interpretation announced in this paragraph and with the decisions dealing with this subject.[21] The combined functions of the employees working

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[20] This paragraph relates to situations where the principal business being dealt with is not within any exemption and the question is whether an adjunct may be within an exemption and provides: "* * * in many cases, section 13(a)(2) does not apply since the facilities furnished serve merely to facilitate or make possible the continued operation of the principal business of the company. In these cases the employer does not operate an adjunct which is unrelated to the principal business but the furnishing of the facilities is an integral part of the principal operations." In reference to examples more specifically detailed therein, such as cook houses, it is stated that they "may not be considered as separate retail or service establishments for purposes of the exemption."

[21] In *Consolidated Timber Co. v. Womack*, 132 F.(2d) 101, 107 C.C.A., 9) a cook house operated in connection with logging operations was held to be "a 'necessary' part of the * * * production of goods for commerce." It was held that the cook house, which likewise served the public, was not a separate or independent establishment entitled to exemption under Section 13(a)(2), but actually a part of the employer's facilities—a link in the chain—whereby it operated its business and a means whereby to accomplish the purpose of its existence. See *Hanson v. Lagerstrom*, 133 F.(2d) 120 (C.C.A., 8); *McLeod v. Threlkeld*, 319 U. S. 491, 493; *Walling v. Rocklin*, 132 F.(2d) 3 (C.C.A., 8).

in the warehouse and central office and those working in the nineteen stores or outlets are necessary to the conduct of respondent's business of selling at retail and one without the other could serve no function. If consistency is to be obtained these decisions lead inescapably to the conclusion that the retail exemption is applicable not only to the employees in the nineteen stores or outlets, but also to the employees working in the warehouse and central office.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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